Annual Case Law Update

Honorable Melodie Powell, ALJ

Matt Murphy, Attorney for Ins./Employer

Dan Mizell, Attorney for Employee

Topics of Discussion

- Current Commission
- Recent Commission Decisions
- Recent Appellate Cases

Current Commission

- Chairman
  - Robert Cornejo appointed August 2018
  - Replacing Larson
  - 6 years as State Representative
  - Licensed Attorney
  - No apparent prior experience
    With Workers Comp.

Current Commission

- Employer Representative
  - Reid Forrester appointed May 2018
  - Business owner for over 20 years

Current Commission

- Employee Representative
  - Curtis Chick, Jr. appointed 2011
  - 25 years as a union representative for sheet metal workers

Commission Decision: Employer?

- LIRC Decision – August 2018
- Employee worked as a truck driver
- Employee filed a CFC alleging injury occurring in 2013
- Employer did not file an answer or appear at the hearing
- Employee testified that his supervisor told him that the Employer did not have workers' compensation insurance because they did not have more than five employees

Commission Decision: Employer?

- The ALJ awarded benefits
- The Commission reversed
  - Reasoning that:
  - Employee failed to meet his burden in showing that he was injured in the context of an employment relationship
  - Based on the employee's testimony of what his supervisor said, the court found that the employer was not operating subject to the workers' compensation laws.

- LESSON: First thing Employee has to prove is that the Employer is Subject to the Workers' Compensation Laws

Commission Decision #2: Causation

- LIRC Decision – November 2018
- Employee alleges CTS due 30 years of repetitive job duties
- Employee was diagnosed with diabetes before the CTS symptoms began
- Dr. Schlafly was Employee's IME physician and also performed the CTS releases
- Was the CTS compensable?

Commission Decision #2: Causation

- ALJ held that the Employee's pre-existing conditions and diabetic neuropathy were the prevailing factor in causing the CTS – not work
- Commission Affirmed
- NOTE: the judge indicated that Dr. Schlafly did not fully consider Employee's job duties or his poorly controlled diabetes
- LESSON: A previous diagnosis of diabetes can help defense if injury can be attributable to diabetic neuropathy

Commission Decision #3: Intervening Cause

- LIRC – October 2018
- Employee complained of eye and throat irritation after exposure to ant spray, which was sprayed around the building's ac units.
- She was being treated by an authorized doctor.
- While in the waiting room at doctor's office, doctor accidently tripped the Employee.
- Employee alleged injury to her knees as a result of the trip and fall accident.
- Injury to the knees compensable?

Commission Decision #3: Intervening Cause

- ALJ said it was compensable and even awarded PTD benefits
- Commission overturned the ALJ holding that the knee injuries were not the direct result of any necessary medical treatment for her primary injury.
- LESSON: An intervening event not directly related to medical care will not relate back to the primary injury

Commission Decision #4: Intervening Cause Part 2

- LIRC – February 2018
- Employee alleged hypersensitivity pneumonitis – a condition caused by breathing in organic dusts
- The claim was accepted as compensable.
- Employee was prescribed Prednisone for her condition.
- Prednisone caused a slew of medical conditions including diabetes
- Was the employer required to pay for treatment for the additional conditions?

Commission Decision #4: Intervening Cause Part 2

- Yes
- The slew of conditions were known side effects of the Prednisone

- LESSON: Side effects from medication taken for the primary work injury can be considered a direct result of necessary medical treatment

Commission Decision #5 Synergistic Effect

- LIRC – October 2018
- 19 year old girl injured her elbow at work.
- She had pre-existing knee injury
- Dr. Poppa, her IME physician, opined that there was a 15% enhancement of the combined disabilities constituting a synergistic effect.
- Was the girl awarded additional compensation from the fund for the synergistic effect of her combined disabilities?

Commission Decision #5 Synergistic Effect

- Although the ALJ awarded an additional $3k, the LIRC overturned
- The LIRC reasoned that:
  - Dr. Poppa did not explain how or in what way the knee injury combined with the elbow injury to create the greater overall disability

- LESSON: The conclusory statements in Employee IME reports should not be given any weight

Commission Decision #6 Workplace Stress

- Highway worker tasked with working serious motor vehicle accidents.
- She testified that after 20 years of working serious injury and fatalities she developed a depressive disorder and PTSD.
- Was she awarded PPD for her mental injuries as a result of experiencing traumatic injuries to motorists?

Commission Decision #6 Workplace Stress

- No
- The Missouri Supreme Court overturned the lower courts.
- The Court found that Missouri law requires: "Mental injuries resulting from work-related stress does not arise out of and in the course of employment unless the stress was work related and extraordinary and unusual."

Commission Decision #6 Workplace Stress

- The court stated:
- "The evidence submitted showed actual work events Employee experienced exposed her to stress. Yet, Employee also needed to present evidence the actual work events comprising the 'same or similar conditions' would have caused extraordinary and unusual stress to a reasonable highway worker."

AB ELECTRICAL, INC., v. JOSEPH FRANKLIN, 559 S.W.3d 38 – Western District

- Franklin fell from scaffolding suffering injuries to his head, neck, and back.
- Employer contended that Franklin had smoked marijuana on the job site and impairment from the drug was the proximate cause of Franklin's fall and injuries resulting in a forfeiture of benefits or penalty under *section 287.120.6*.

AB ELECTRICAL, INC., v. JOSEPH FRANKLIN, 559 S.W.3d 38 – Western District

- The Commission awarded Franklin temporary total disability benefits and ordered Employer to pay past medical expenses arising from this injury.
- The award provided that Employer is to be responsible for future medical treatments as necessary and deemed the award "temporary or partial" and left the matter open until a final award is issued.

AB ELECTRICAL, INC., v. JOSEPH FRANKLIN, 559 S.W.3d 38 – Western District

- Holding: Court of appeals lacks the authority to review a temporary award of the Commission.
- Why: The 2005 amendments indicate strict construction is appropriate.
- Lesson: Strict construction effectively eliminated the existing judicially created exceptions allowing review of a temporary award.

VERNIS FARMER, v. SIF, 567 S.W.3d 228 – Southern District

- Claimant had been convicted of making a false statement to obtain social security benefits and knowingly concealing wages above the income threshold for disability payments.

VERNIS FARMER, v. SIF, 567 S.W.3d 228 – Southern District

- In its decision, the ALJ denied compensability because ALJ did not credit Dr. Volarich's opinion regarding causation
- Why: Because Dr. Volarich "was relying on the reported symptoms and history as provided by [Claimant], which has been established as not trustworthy."

VERNIS FARMER, v. SIF, 567 S.W.3d 228 – Southern District

- Commission Affirmed
- Holding: Commission exercised its discretion to reject Claimant's uncontradicted expert testimony as unreliable because it was based upon information provided by Claimant, an unreliable historian.

VERNIS FARMER, v. SIF, 567 S.W.3d 228 – Southern District

- Having no credible expert testimony in support of his claim, Claimant has failed to convince us that the Commission's decision denying his claim was not supported by substantial and competent evidence on the whole record.

HARLEY-DAVIDSON v. Jones and SIF, 557 S.W.3d 328, Western District

- On July 13, 2011, Jones submitted to Employer a report of injury.
- Jones checked the box indicating injury to his "Arm/Shoulders" and specified stinging fingers and "sharp" and "radiating" pain from his right elbow, which he had also injured in 2010.
- That same day, Employer sent Jones to Dr. Gil Wright, who diagnosed Jones with a right elbow sprain. Jones was fitted with a sling and given significant work restrictions. Jones's care was then transferred to Dr. Paul Nassab at Drisko, Fee & Parkins.

HARLEY-DAVIDSON v. Jones and SIF, 557 S.W.3d 328, Western District

- The next day, Jones experienced back pain that would intensify over the coming weeks. On Sept 26, 2011, Jones mentioned his back pain to Dr. Nassab, who then referred Jones to Nassab's partner, orthopedic surgeon Dr. Robert Drisko.
- On September 27, 2011, the back pain became intolerable, and Jones admitted himself to emergency care.

HARLEY-DAVIDSON v. Jones and SIF, 557 S.W.3d 328, Western District

- On October 4, 2011, Jones saw Dr. Drisko, who diagnosed Jones with spondylolisthesis, a condition marked by instability in the back. While the spondylolisthesis was a pre-existing condition, Dr. Drisko believed Jones's July 13, 2011 injury was a torque injury that was the prevailing factor in his present medical condition.
- The Employer's health department informed Jones he was not to complete a new injury report and, instead, instructed him to contact the insurance adjuster. Though Employer refused Jones's request for low back treatment, Jones continued treatment with Dr. Drisko.

HARLEY-DAVIDSON v. Jones and SIF, 557 S.W.3d 328, Western District

- On December 2, 2011, Jones submitted a claim for compensation with the Division of Workers' Compensation. The claim indicated injury to Jones's "back and body as a whole“
- In the section for Second Injury Fund claims, Jones checked the box for "permanent partial disability.“
- Jones submitted an amended claim on August 15, 2014, updating his address and checking the box for "permanent total disability" under Second Injury Fund claims. In their amended answer, Appellants "specifically deny any injury to 'back and body as a whole,' as alleged, and assert that there had been no proper notice regarding any alleged injury to 'back and body as a whole,' and claim prejudice therefrom."

HARLEY-DAVIDSON v. Jones and SIF, 557 S.W.3d 328, Western District

- On July 15, 2015, the Administrative Law Judge found Jones's elbow and low back injuries occurred in the course and scope of his employment, and Employer was given notice as required by statute. Jones was awarded $39,205.64 for the claimed period during which Jones was temporarily totally disabled. On September 14, 2017, the Commission affirmed the award, adopting the ALJ's factual findings related to accident and causation but providing its own analysis on the issue of notice.

HARLEY-DAVIDSON v. Jones and SIF, 557 S.W.3d 328, Western District

- The Commission disclaimed the ALJ's notice analysis, which cited a version of *Section 287.420* predating the statute's 2005 amendment.
- Prior to 2005, *Section 287.420* provided a "good cause" exception to the statutory requirement of written notice.
- Though the ALJ concluded Employer had actual knowledge of Jones's accident, he also suggested the latent nature of Jones's back injury was good cause for any failure to provide written notice. Since Jones's accident occurred in 2011, the 2005 amendment striking the good cause exception was clearly in force.

HARLEY-DAVIDSON v. Jones and SIF, 557 S.W.3d 328, Western District

- The Court of Appeals Held: Commission did not err in granting the award, because Employer was not prejudiced by Jones's failure to provide written notice of his injury, in that Employer had actual knowledge of Jones's workplace injury.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- McDowell had worked at St. Luke's since 1971.
- At the time of her injury, McDowell was a Laboratory Scientist 1.
- Her normal workings hours were from 3:00 p.m. to 11:30 p.m. and would park on the fourth level of a high-volume parking garage used exclusively by St. Luke's employees.
- Over time, as McDowell aged, she began experiencing difficulties with these arrival practices as she could not walk long distances while carrying work and personal items.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- 1996: A supervisor provided McDowell with a two-wheeled rolling cart to more easily transport her belongings.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- On July 13, 2016, McDowell arrived at work and parked on the fourth floor of the parking garage. She descended the elevator while pulling the rolling cart.
- She exited the elevator, and continued to exit the parking garage through the north door. At the north door, she encountered two other employees. One employee opened the door for her, while the second employee stood next to the other, somewhat blocking McDowell's path through the door. McDowell proceeded through the door, and attempted to maneuver to the right of the second employee.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- In doing so, the wheel of the rolling cart, which McDowell pulled, caught on the door frame.
- This jerked McDowell, causing her to fall to the ground, fracturing her left wrist. Shortly thereafter, McDowell underwent surgery to repair the fracture and was ordered off work until August 29, 2016. McDowell filed a claim for workers' compensation benefits on August 31, 2016.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- The ALJ Award found that the "risk source (pulling a cart of work related supplies through a congested entryway) [was] related to the workplace and not a risk source Ms. McDowell would be likely to encounter in her non-work life."
- The ALJ Award further concluded that McDowell's injury arose in the course and scope of employment. The ALJ Award also found that the McDowell's fall was not the result of an idiopathic cause.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- The Commission affirmed and incorporated the ALJ Award.
- St. Luke's argues that insufficient competent evidence supports the Commission's finding that McDowell's use of the roll cart was necessary for her work.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- Here, the Commission found that "the activity that gave rise to Ms. McDowell's injury was pulling a two-wheeled cart through a congested doorway.“
- The Commission found that "the risk source (pulling a cart of work related supplies through a congested entryway) [was] related to the workplace and not a risk source Ms. McDowell would be likely to encounter in her non-work life."
- St. Luke's does not challenge the Commission's characterization of the activity that gave rise to McDowell's injury -- i.e. the risk source. Rather, relying on *Johme, 366 S.W.3d at 511-12*, St. Luke's asserts McDowell's cart was not work related, and thus, McDowell was merely injured while at work, rather than *because* of work. *Johme* is inapposite.

MCDOWELL, v. ST. LUKE'S HOSPITAL, 5/16/2019 – Western District

- No prior case suggests that the fact the employee was carrying work-related items was essential to a finding of compensability.
- Rather the court must focus its inquiry on whether substantial and competent evidence could support a finding that the risk source of the injury was posed equally to the employee in his normal nonemployment life. *Pope, 404 S.W.3d at 320*.
- No such evidence was presented in the record to permit such a finding.

MOSS v. SIF, 2018 Mo. App. LEXIS 1663 - Western District

- On April 11, 2012, Moss, a corrections officer, injured his right shoulder at work. Moss, who is right-hand dominant, was carrying a 150-pound footlocker up a flight of stairs with a coworker when the coworker dropped his end of the locker and it yanked Moss's right arm, causing immediate pain in his arm and neck.
- Dr. Satterlee eventually performed a right-shoulder replacement, but Moss continued to experience ongoing pain and difficulty lifting even light objects.

MOSS v. SIF, 2018 Mo. App. LEXIS 1663 - Western District

- Dr. William Hopkins concluded:
- "Mr. Moss has very limited work capabilities. His ability to work would be limited to a sedentary occupation that requires mostly sitting, with the ability to change positions as needed. He will not be capable of repetitive right upper extremity work. His weight capability should be no more than 10 pounds from waist to shoulder using both hands. He is not capable of above shoulder work with his right arm. He is not capable of repetitive bending from the waist more than on an occasional basis, from his previous lumbar spine injury"

MOSS v. SIF, 2018 Mo. App. LEXIS 1663 - Western District

- The Second Injury Fund argued that Dr. Hopkins did not conclude that Moss was permanently totally disabled.
- The ALJ noted that permanent total disability is not exclusively a medical question; rather, it is a question of "whether any employer in the usual course of business would be reasonably expected to hire the employee in [his] present physical condition, reasonably expecting the employee to perform the work for which he . . . is hired."

MOSS v. SIF, 2018 Mo. App. LEXIS 1663 - Western District

- The Commission affirmed the ALJ's award.
- The Commission concluded that *§ 287.190.6(2)* "does not imply or mandate any requirement that a medical expert . . . specifically address or attempt to resolve the question whether the test for permanent total disability under Chapter 287 has been satisfied."
- The Commission further explained that analysis of the extent of disability involves evaluating issues such as job requirements and availability, transferrable skills, and retraining prospects; it also noted, "[i]n many (and perhaps most) cases, physicians do not possess the training, experience, or access to information necessary to render competent opinions regarding an injured worker's prospects for returning to any employment.

MOSS v. SIF, 2018 Mo. App. LEXIS 1663 - Western District

- The Court Affirmed: Because the requirement in *§ 287.190.6(2)* that a physician demonstrate and certify permanent total disability was met and there was sufficient competent evidence in the record to support the Commission's finding, the Commission did not err in awarding Moss permanent and total disability benefits.

NAETER, vs. SIF, 2019 Mo. App. LEXIS 350 – Eastern District

- On October 17, 2006 Nancy Naeter filed an original claim for compensation against her employer for bilateral hearing loss.
- Her last day of employment was September 9, 2005.
- December 3, 2010 Employee filed her first amended claim adding Tinnitus and Meniere's disease to her hearing loss claim against the Employer.
- On December 16, 2011 Employee filed a second amended claim. In her second amended claim, Employee named the Second Injury Fund as a party to the workers' compensation proceedings.

NAETER, vs. SIF, 2019 Mo. App. LEXIS 350 – Eastern District

- Prior to a trial, the claim against Employer was settled.
- The Administrative Law Judge denied the claim against the SIF as time-barred by the statute of limitations under *§ 287.430* Commission reviewed the case and adopted the decision of the ALJ.

NAETER, vs. SIF, 2019 Mo. App. LEXIS 350 – Eastern District

- *Section 287.430* establishes the statutes of limitations for claims against both employers and the SIF.
- "A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later."

NAETER, vs. SIF, 2019 Mo. App. LEXIS 350 – Eastern District

- In its brief the SIF argues "a claim" should be interpreted to mean only the first or original claim filed against an employer. That meaning is not consistent with strict construction as it asks us to add words to the statute.
- The Supreme Court in Elrod held "a claim" includes "any timely claim" and does not necessarily mean "the claim" or "original claim." Id. At 716-17. We decline to interpret *§ 287.430* such that the SIF statute of limitations is within two years after the date of the injury or within one year after the first or original claim is filed against an employer or insurer.

NAETER, vs. SIF, 2019 Mo. App. LEXIS 350 – Eastern District

- The second amended claim is the crux of this case. Under the Missouri Code of State Regulations, an employer and the SIF are considered two separate parties when an employee makes a claim for workers' compensation. *8 CSR 50-2.010(7)(B)*. "[A]n assertion of a claim against one is not an assertion of a claim against the other."

NAETER, vs. SIF, 2019 Mo. App. LEXIS 350 – Eastern District

- The SIF claim was filed over two years after the date of the injury and over one year after the first amended claim against Employer.
- No other claim was filed which could be used to calculate the SIF limitations period.
- The second amended claim was only thirteen days late.

ROBINSON, vs. LOXCREEN CO., and SIF, 2019 Mo. App. LEXIS 571; 2019 WL 1614592

- In November 2007, Claimant was injured in a work accident involving a metal dolly stacked with over 2,000 pounds of weight.
- Claimant filed a claim for permanent total disability for injuries to his head, right side of face, right eye, right shoulder, hands, left hip, and left knee.

ROBINSON, vs. LOXCREEN CO., and SIF, 2019 Mo. App. LEXIS 571; 2019 WL 1614592

- Claimant was the only live witness. The remainder of the evidence at the hearing consisted of deposition testimony and reports from various experts, including Dr. David Volarich on behalf of Claimant, and Doctors Robert Bernardi and Michael Nogalski on behalf of Employer.
- The ALJ determined that the work accident was not the prevailing factor in causing the injuries to Claimant's left hip, left knee, back, right shoulder, and right wrist. The ALJ decided that Claimant did not need additional medical care, and did not find the Fund liable.

ROBINSON, vs. LOXCREEN CO., and SIF, 2019 Mo. App. LEXIS 571; 2019 WL 1614592

- On review, the Commission entered its award, modifying the ALJ's award as to: (1) medical causation; (2) permanent partial and permanent total disability; (3) future medical care; (4) the liability of the Fund; and 5) attorney's fees. The Commission found the testimony of Claimant's medical examiner, Dr. Volarich, to be "persuasive" in his findings as to causation. The Commission found Claimant to be permanently partially disabled as a result of the work accident.

ROBINSON, vs. LOXCREEN CO., and SIF, 2019 Mo. App. LEXIS 571; 2019 WL 1614592

- Regarding the Fund's liability, the Commission further relied on the opinion of Dr. Volarich. The Commission concluded that Claimant's preexisting medical conditions, combined with his current injuries and disabilities rendered Claimant totally disabled. Accordingly, the Commission found the Fund liable for permanent total disability benefits. It also awarded Claimant the costs of future medical care related to the effects of Claimant's work injury.

ROBINSON, vs. LOXCREEN CO., and SIF, 2019 Mo. App. LEXIS 571; 2019 WL 1614592

- Court of Appeals affirmed in all respects.
- Court said: The Fund spends the bulk of its argument pointing out the medical evidence that it claims contradicts the Commission's decision, and in doing so, underrepresents the supportive evidence that favors the award.

ROBINSON, vs. LOXCREEN CO., and SIF, 2019 Mo. App. LEXIS 571; 2019 WL 1614592

- Court also said: Employer acknowledges that the Commission found Dr. Volarich's opinion on causation to be persuasive, and then proceeds to marshal the evidence *contrary* to Dr. Volarich's opinion.
- Employer's failure to apply the correct analytical process is clear.

ROBINSON, vs. LOXCREEN CO., and SIF, 2019 Mo. App. LEXIS 571; 2019 WL 1614592

- If the evidence before the Commission supports either of two findings, this Court is bound by the Commission's decision, and it is "irrelevant that there is supportive evidence for the contrary finding."

STATE v. SEYMOUR, 2019 Mo. App. LEXIS 400 *; 2019 WL 1333102 – Western District

- A Company did not appear to have workers' compensation insurance from August 3, 2011 through October 3, 2013.
- February 3, 2014, a Fraud and Noncompliance Unit investigator discovered company was uninsured.

STATE v. SEYMOUR, 2019 Mo. App. LEXIS 400 *; 2019 WL 1333102 – Western District

- The Fraud and Noncompliance Unit investigator did not undertake any other investigation until mid-May, 2014.
- In mid-June, 2014, the Fraud and Noncompliance Unit prepared a probable cause statement and referred Seymour's alleged offense to the Attorney General's Office for prosecution.
- On May 17, 2017, the State charged Seymour with failure to insure workers' compensation liability in violation of *section 287.128.7*.

STATE v. SEYMOUR, 2019 Mo. App. LEXIS 400 *; 2019 WL 1333102 – Western District

- The trial court found:
- "the discovery date of the alleged criminal conduct was February 3, 2014, that more than three (3) years elapsed before the filing of the State of Missouri's initial information and that in accordance with *Section 287.128.11*, this proceeding is now time barred."

STATE v. SEYMOUR, 2019 Mo. App. LEXIS 400 *; 2019 WL 1333102 – Western District

- Court concluded: The time taken to complete the investigation was not objectively reasonable given a delay of over three months when no investigative efforts were being pursued.
- The Fraud and Noncompliance Unit's objectively reasonable investigation therefore ended on February 3, 2014.
- Since Seymour was charged with violating *section 287.128.7* on May 17, 2017, prosecution of the charge was time-barred by *section 287.128.11*.